(14)

No. 83-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation whose

* Letters of consent to the filing of this Brief have been lodged with the Clerk of Court.

principal purpose is to secure civil and contitution rights of black people. For more than forty years, its attorneys have represented parties in thousands of civil rights actions, including many significant cases before this Court. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971) ; Brown v. Board of Education, 347 U.S. 483 (1954).

A substantial percentage of LDF's current docket consists of cases involving employment discrimination, voting rights, and various constitutional and statutory claims. In these areas, prevailing plaintiffs normally are entitled to reasonable attorney's fees pursuant to various statutory fee-shifting provisions.

LDF thus believes that the Court's decision in the case at bar may significantly affect both its own ability to represent clients in future cases and the ability of victims of discrimination in general to vindicate their rights.

Summary of Argument

1. Defining the word "costs" in Rule 68 to include attorney's fees in cases involving fee-shifting is inconsistent with the purpose of the Rule and would not promote just and speedy settlements. In addition, adopting petitioner's reading of "costs" would simply redistribute the gains of settlement in favor of defendants.

2. Petitioner's construction of Rule 68 would significantly undermine Congress' intent in enacting fee-shifting statutes. Congress and this Court have made clear that prevailing plaintiffs in civil rights

actions are entitled to reasonable attorney's fees unless there are special circumstances which would render an award of attorney's fees unjust. A plaintiff's good-faith refusal of a defendant's offer of judgment simply is not such a special circumstance.

3. Including attorney's fees within the definition of costs would pose tremendous problems in class actions. The intent of the drafters of Rule 68 to prevent the court from becoming involved in the offer of judgment conflicts with the supervisory responsibilities of the court under Rule 23. Petitioners' interpretation would drive a wedge between the interests of the named plaintiff and those of the class.

4. Petitioners' construction of Rule 68 would create, at the very least, an apparent conflict of interest between plaintiffs and their attorneys. It would create an incentive for lawyers to counsel their clients to settle cases in order to guarantee their own fees rather than because the settlement is in fact favorable to the client.

Argument

I. PETITIONERS' CONSTRUCTION OF RULE 68 NEITHER PROPERLY INTERPRETS THE LANGUAGE OF THE RULE NOR SERVES THE POLICIES UNDERLYING THE RULE.

"The purpose of Rule 68 is to encourage the settlement of litigation," Delta Air Lines v. August, 450 U.S. 346, 352 (1981), and thus to contribute to "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Interpreting the word "costs" to include attorney's fees as well as the costs listed in 28 U.S.C. § 1920

(1982) in cases involving statutory attorney's fee-shifting provisions would not serve that goal.

Rule 68 uses the word "costs" in two contexts directly relevant to the incentives it provides for settlement. The Rule applies to offers, "with costs then accrued." Fed. R. Civ. P. 68 (emphasis added). The Rule further provides that "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Id. (emphasis added).

Petitioners argue that courts should look to any definition of costs provided by a substantive statute involved in the case. Because 42 U.S.C. § 1988 (Supp. V 1981) states that "in any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised

Statutes, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1965, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," petitioners would include a prevailing plaintiff's post-offer attorney's fees within the costs which the plaintiff must bear if the defendant's offer exceeds his ultimate recovery at trial. As the Court of Appeals noted in this case, such a conclusion "rests on [a] rather mechanical linking up" of the two provisions. Chesny v. Marek, 720 F.2d 474, 478 (7th Cir. 1983).

A. The Language of Rule 68 Does Not Permit the Equation of "Costs" Under the Rule with "Costs" as Used in Fee-Shifting Statutes.

In Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), this Court held that the attorney's fees provisions in §§ 1988 and

2000e-5(k) should not be incorporated into 28 U.S.C. § 1927 (1976; codified as amended, 1982), which permits a court to tax the excess costs of a proceeding against a lawyer who multiplies the proceedings unreasonably and vexatiously. The Court rested its rejection of the "superficially appealing argument" that the non-defined "costs" mentioned in § 1927 could be given meaning by reference to §§ 1988 and 2000e-5(k), 447 U.S. at 758, on a number of considerations applicable to the case at bar.

To paraphrase Piper, petitioner's construction of Rule 68 and § 1988 "could introduce into the [Rule] distinctions unrelated to its goal ... and could result in virtually random application of [Rule 68] on the basis of other laws that do not address the problem of controlling abuses of

judicial processes." 447 U.S. at 761-762. It would make little sense to interpret Rule 68 in a way that gives significant weight to those insignificant variations.

For example, many employment discrimination cases alleging bias on the basis of gender are brought under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982). The attorney's fees provision of Title VII allows prevailing plaintiffs to recover fees "as part of the costs" of suit. 42 U.S.C. § 2000-5(k). The provision of the Fair Labor Standards Act applicable to Equal Pay Act claims, however, directs the court to award "a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b) (1982) (emphasis added). It would be absurd to argue that a prevailing

plaintiff should not recover that part of his post-offer fees expended on a Title VII claim while he should recover that part involved in an Equal Pay Act claim.

Such an approach would fly in the face of this Court's recognition in Hensley v. Eckerhart, ____ U.S. ____, 76 L.Ed.2d 40, 51 (1983), that many civil rights cases "involve a common core of facts or will be based on related legal theories" which make it inappropriate for a court to apportion an attorney's fees request among various claims on a mechanical basis. Rule 68 simply cannot be read to toll the defendant's liability for fees for the Equal Pay Act claim, since they are not "costs." Thus, a defendant's claim that a prevailing plaintiff's fees should somehow be reduced would embroil the judge in a parsing exercise based on fine linguistic variations which Petitioners'

argument in this case transforms into artificial bright-line distinctions. Surely, there is no logical reason to suppose that the judicial system should be more eager to induce settlement of Title VII sex-discrimination claims that of virtually identical Equal Pay Act causes of action.

Furthermore, this Court's decision in Roadway Express, like its decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), reserved for Congress the delicate duty of determining how prevailing plaintiffs' attorney's fees should be affected by general, procedural provisions. See Act of Sept. 12, 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1156 (codified at 28 U.S.C. §1927 (1982)), (amending § 1927 to include "attorney's fees reasonably incurred" as well as "costs"). In addition, unlike Rule 68, Fed. R. Civ P. 37(b), which

concerns sanctions for a party's failure to comply with discovery orders, explicitly provides that the court shall normally assess "the reasonable expenses, including attorney's fees, caused by the failure [to comply]."

The recent proposal by the Advisory Committee on Civil Rules to amend Rule 68 to include attorney's fees in all cases adds support to the inference that the Rule does not currently view fees as costs. The proposed amendment provides that an offeree who recovers less than the offer "must pay the costs <u>and expenses including reasonable attorney's fees</u>, incurred <u>by the offeror</u> after the making of the offer...." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Rule 68 Offer of Settlement, 98 F.R.D. 337, 362 (1983) [hereinafter cited as <u>Proposed Rule</u>

<u>68</u>] (new material in italics). If the term "costs" necessarily included attorney's fees, then the addition of the phrase "and expenses including ... fees" would have been unnecessary. The drafters' inclusion of "and expenses including ... fees" therefore supports the inference that "costs" as it now stands refers solely to the traditional costs defined in 28 U.S.C. § 1920. Thus, "costs" under Rule 68 has retained its "technical" meaning, while "costs" under §§ 1988 and 2000e-5(k) has been broadened to include the actual expenses of litigating a case. <u>Cf.</u> Freedom of Information Act, 5 U.S.C. § 522(a) (4) (E) (1982) (providing for award of "reasonable attorney's fees and other litigation costs reasonably incurred").

The proposed amendment also would eliminate the requirement that a Rule 68 offer include costs. The Advisory Committee Note explains this deletion by referring to the confusion which the inclusion of the requirement would cause if read in conjunction with fee-shifting statutes' definitions of "costs." Proposed Rule 68, 98 F.R.D. at 364. This confusion would also arise if petitioners' erroneous construction of the Rule is adopted. If attorney's fees are not viewed as part of the costs to which Rule 68 applies, then there is no problem. As this Court noted in Roadway Express, from the very outset Congress has sought "to standardize the treatment of costs in federal courts, to 'make them uniform --make the law explicit and definite.'" 447 U.S. at 761 (quoting H.R. Rep. No. 50, 32d Cong. 1st Sess. 6 (1852)). The aim of uniformity

embodied in Congress' intent and the Federal Rules of Civil Procedures would best be served by defining costs in Rule 68 proceedings identically in all cases.

B. Petitioners' Construction of Rule 68 Would Not Promote Increased Settlement.

Petitioners' argument assumes that the allowance or disallowance of post-offer counsel fees will only affect plaintiffs' decisions whether to accept settlement offers or continue to trial. This exclusive concentration on the way in which Rule 68 influences plaintiffs' incentives to accept an offer ignores the deterrent effect petitioners' proposal will have on defendants' decisions to make settlement offers.

Through an offer of settlement, the defendant can fix his liability at a certain sum and, he hopes, pay less than he would be

found liable for at trial.Thus, a key factor in a party's decision about settlement is his assessment of his prospects should the case go to trial. Under the rule enunciated by the Seventh Circuit in Chesny, this would be the sum of the present expected value of the plaintiff's recovery on the merits and the present expected value of the plaintiff's reasonable attorney's fees (discounted, of course, by the likelihood of the plaintiff's prevailing). The defendant has a strong incentive to settle the case for any amount less than this sum plus his costs of going to trial, an amount he will subjectively determine. The cost-shifting scheme embodied in § 1988 contributes to the pressure on defendants to settle. See Hensley v. Eckerhart, ____ U.S. ____, 76 L.Ed.2d 40, n.2 (1983) (Brennan, J., concurring in part and dissenting in part);

Dennis v. Chang, 611 F.2d 1303, 1307 (9th Cir. 1980). In negotiations, the plaintiff, who does not know the defendant's subjective assessment, will try to drive the defendant's maximum offer up until it exceeds the plaintiff's subjective assessment.

The effect of petitioners' proposal would simply be to shift the "price range" within which settlement negotiations take place. A defendant will make a lower offer to a plaintiff, since the expected value of his liability to the plaintiff will decrease by the amount of the plaintiff's post-offer attorney's fees should the plaintiff recover less at trial. A plaintiff's demands also will decrease, since the cost of proceeding to trial will now also include that part of his attorney's fees which he cannot recover if the offer exceeds the judgment he obtains

after trial. That such a shift occurs, however, says absolutely nothing about whether the gap between a plaintiff's minimum demand and a defendant's maximum offer --which determines whether there will be a settlement --will become wider or narrower.

Thus, the primary effect of Petitioner's construction would be distributive: since the price of settlement offers will decrease, defendants will retain more and plaintiffs will receive less. There is absolutely nothing in Rule 68 to suggest, however, that it or the rules of civil procedure in general are intended to distribute the amount at issue in a lawsuit in the defendant's favor. Indeed, the only cases which petitioner's construction would affect are precisely those in which there is a clearly articulated Congressional policy

favoring plaintiffs. See infra Section II. Thus, because petitioners' interpretation of Rule 68 is "indifferent to the equities of a dispute and to the values advanced by the substantive law," Roadway Express, Inc. v. Piper, 447 U.S. at 762, it must be rejected.

II. PETITIONERS' CONSTRUCTION OF RULE 68 WOULD UNDERMINE THE CLEAR CONGRESSIONAL POLICIES EMBODIED IN FEE-SHIFTING PROVISIONS IN CIVIL RIGHTS CASES.

In deciding to enact § 1988 following the decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), Congress clearly stated its belief that attorney's fees to prevailing parties play a critical role in civil rights cases: "One aspect of complete relief is an award of attorney's fees which Congress considered necessary for the fulfillment of federal goals." New York Gaslight Club, Inc. v. Carey, 477 U.S. 54, 67-68 (1980); see S. Rep

No. 1011, 94th Cong., 2d Sess. 5 (1976). There are three principles which must inform the award of fees. First, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Hensley v. Eckerhart, 76 L. Ed.2d at 49; see Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (per curiam); S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3 (1976). Second, a prevailing plaintiff's fee must be reasonable. Hensley, 76 L.Ed.2d at 50. Third, a defendant is entitled to recover his fees from a plaintiff under § 1988 only "where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 76 L.Ed.2d at 48, n.2.

As this Court noted in Christiansburg Garment Co., even "a moment's reflection" explains this differential treatment of prevailing plaintiffs and defendants: "First, ... the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." 434 U.S. at 418. Petitioner's arguments as to how Rule 68 should operate in civil rights cases ignores these concerns.

A. The Current Standard for Awarding Counsel Fees in Civil Rights Cases Better Serves the Purposes of § 1988.

Recently in Hensley v. Eckerhart, this Court clarified the proper relationship of the results obtained to an award of attorney's fees. Petitioner's construction

of Rule 68's relationship to § 1988 is inconsistent with the considerations enunciated in Hensley.

Hensley set out the process by which a trial court should assess a prevailing plaintiff's request for counsel fees. "The most useful starting point ... is the number of hours reasonably expended multiplied by a reasonable hourly rate." 76 L.Ed. 2d at 50. In determining the number of hours reasonably expended, the district court should exclude "excessive, redundant, or otherwise unnecessary" hours. Id. at 51; see Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc).

The district court may adjust this "lodestar figure to reflect the degree of a plaintiff's success." 76 L.Ed.2d at 52.

This Court made clear, however, that such a reduction should not be based on any mechanical formula. Id. at 52, n. 11.

The Court "reemphasize[d] that the district court has discretion in determining the amount of the fee award. This is appropriate in view of the district court's superior understanding of the litigation," id. at 53 and stressed the undesirability of having the request for counsel fees "result in a second major litigation," id.

1. Petitioners' Standard Would Improperly Deny the District Court Discretion in Awarding Fees

Hensley focuses on the reasonableness of a prevailing plaintiff's request, given all the circumstances. In contrast,

petitioners' approach totally ignores the individual circumstances of particular cases.

A district court's evaluation of a reasonable attorney's fee is made within the context of the Congressional purpose that courts award fees adequate to insure the competent representation of civil rights plaintiffs. Petitioner in this case would scrap this fact- and policy-bound inquiry in favor of a mechanical rule that would hold all post-offer expenditures of time by a plaintiff to be irrebuttably unreasonable. Unlike § 1988, or, for that matter, Rule 54, Rule 68 requires a less-successful offeree to pay costs incurred after the offer; it affords no discretion to the trial judge. As this Court noted in Delta Air Lines, however, such discretion is critical to the entire cost-allocation scheme. 450 U.S. at 353-55.

This Court decisively rejected such an irrebuttable presumption in Christiansburg Garment Co., 434 U..S. at 422. Such a presumption should also be rejected here. If, under Christiansburg Garment Co., a losing plaintiff cannot be forced to bear his opponent's costs simply because he has lost, the case against requiring a winning plaintiff to pay what would otherwise be the defendant's obligation simply because he made an erroneous guess about his recovery at trial is all the more compelling.

Moreover, petitioners' construction of Rule 68 would impair the accuracy of a plaintiff's assessment of a defendant's offer by encouraging a defendant to make a very early offer. If the offer is made

before the plaintiff has completed discovery, it both requires the plaintiff to evaluate the merit of the offer without adequate information and places the plaintiff at risk of being liable for all his own fees if discovery shows that he is unlikely to be more successful at trial.

Finally, in a manner contrary to the principles of the fee-shifting statute, Petitioner's proposed mechanical standard would work unfairly in many civil rights actions. As Christiansburg Garment Co., notes, the law in many areas of antidiscrimination may change substantially between the time a suit is filed and its ultimate determination. Thus, at the time the offer was made, the plaintiff might have been entitled to all the relief he was seeking, given the facts adduced at trial. By the time of trial, however, standards may

have changed in a way that denies plaintiff some of that relief. Even though the results plaintiff has achieved under the new standard are "excellent," Hensley, 76 L.Ed.2d at 52, and worth the expenditure of hours spent, they may not be equal to the defendant's earlier offer. If the fees incurred are consonant with the result achieved, it would be unreasonable to deny those fees merely because plaintiffs could have done better than the law allows. Additionally, the 1946 amendments to Rule 68 make clear that a defendant whose first offer was not accepted may make additional offers: "In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained." Advisory Committee Note, Fed. R. Civ. P. 68. If, however, a

plaintiff's attorney advises him to reject an offer, the plaintiff follows that advice and the defendant makes a new, higher offer, then the plaintiff's initial refusal was clearly reasonable, whatever the merits of his additional refusals. Thus, to disallow the attorney's fees involved in attempting to extract a better settlement offer from a defendant who offers an unacceptably low amount the first time around would compel plaintiffs to settle for less than their claims are really worth.

Overall, then, by ignoring the reasonableness of the parties' actions and forbidding the proper exerise of judicial discretion under § 1988, Petitioners' interpretation undermines this Court's longstanding approach to the award of attorney's fees.

2. Petitioners' Construction of Rule 68 Would Result in Increased Litigation Over Attorney's Fees.

There are two reasons why adopting petitioner's interpretation of Rule 68 would increases the already substantial amount of fee-award litigation now occupying the courts. Petitioners' interpretation provides defendants' with an incentive to litigate such questions, and it involves application of an extraordinarily complex standards which will encourage appeals from trial court's findings.

If petitioners' reading of the Rule were adopted, a defendant would have to be a fool not to make some offer in every case involving fee-shifting, since that offer, know matter how low, would automatically toll the accumulation of attorney's fees if

the plaintiff was less successful at trial. increase the already substantial amount of fee-award litigation now occupying the courts. Petitioners' interpretation provides defendants with an incentive to litigate such questions, and it involves application of an extraordinarily complex standard which will encourage appeals from trial court's findings.

If petitioners' reading of the Rule were adopted, a defendant would have to be a fool not to make <u>some</u> offer in every case involving fee-shifting, since that offer, no matter how low, would automatically toll the accumulation of attorney's fees if the plaintiff was less successful at trial. Thus, in every case in which the plaintiff is not wholly successful in prevailing on all his claims, a defendant may claim release from post-offer fees. This type of

claim will be particularly prevalent whenever the cost of litigating this issue is likely to be less than the costs of paying the additional attorney's fees the plaintiff claims.

This temptation to litigate will be exacerbated by the complexity of many civil rights cases. Rule 68 may be well designed for cases involving purely monetary claims. It is easy to see that an offer of $50,000 plus costs is more favorable to the offeree than an ultimate recovery of $25,000 plus costs. As this Court noted in <u>Hensley</u>, however, it is far more difficult to assess the relative merits of various "packages" of relief which involve non-pecuniary recovery. The Senate Report accompanying the enactment of § 1988 makes crystal clear that attorney's fees in civil rights cases should not be affected by the non-pecuniary nature

of the rights involved. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). Thus, to elaborate upon the Court's example in Hensley, 76 L.Ed.2d at 52 n.11, suppose that a plaintiff sued for $10,000 in damages and an injunction stopping certain allegedly unconstitutional prison practices. If the defendant offered the plaintiff $5,000 in damages, but refused to agree either that it had violated his constitutional rights or that it would discontinue the practices, the plaintiff might well refuse the offer. Suppose at trial the plaintiff is unable to prove actual damages and therefore is entitled only to nominal damages of $1, see Carey v. Piphus, 435 U.S. 247, 266 (1978),

but he succeeds in proving the unconstitutionality of the practice and in obtaining an injunction. It is undoubtedly clear that the plaintiff is a prevailing party within the meaning of § 1988. See Hensley, 76 L.Ed.2d at 50; McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983) (upholding award of fees in a similar case). It is far less clear, however, that every district court would hold that such a plaintiff was more successful at trial than he would have been had he accepted the defendant's offer. Thus, even though the defendant knows that the plaintiff will be entitled to some fee award, he has an incentive to challenge post-offer fee requests on the ground that the plaintiff did not prevail by enough.

B. <u>The Proposed Standard Undermines the Substantive Goals of the Civil Rights Laws</u>.

For nearly twenty years this Court has recognized that enforcement of the civil rights laws depends on private litigation and that when a civil rights plaintiff prevails, "he does not do so for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." Newman v. Piggie Park Enterprises, 390 U.S. at 402. The Senate Report accompanying the passage of § 1988 put the matter bluntly:

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain..... "Not to award counsel fees ... would be tantamount to repealing the [civil rights] laws [themselves] by

> frustrating their basic purpose...." Without counsel fees the grant of Federal jurisdiction is but an empty gesture.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 3 (1976) (citations omitted).

Petitioners' construction of Rule 68 would undermine this explicit Congressional concern in two ways: First, it will deter plaintiffs from vigorously pursuing vindication of their personal interests in nondiscriminatory treatment, such as backpay or reinstatement. Second, it will create a dangerous incentive for an individual plaintiff to compromise the wider public interests involved in his particular case. Because of these adverse effects on the substantive ends of civil rights law, Petitioners' interpretation of Rule 68 runs afoul of the Rules Enabling Act.

1. Petitioners' Reading of Rule 68 Will Deter Plaintiffs from Pursuing Meritorious Claims.

As the Second Circuit noted, "[t]he standard by which [courts] allocate counsel fees between a victorious litigant and his opponent can have a substantial effect on settlement negotiations, and, indeed, on a prospective plaintiff's very decision to bring suit." Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1027 (2d Cir. 1979). The legislative history of § 1988 clearly recognized that individuals who alleged the violation of their civil rights "must have the opportunity to recover what it costs them to vindicate these rights in court.... If the cost of private enforcement becomes too great there will be no private enforcement." S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 6 (1976).

Petitioners' position would raise these costs because it penalizes plaintiffs twice for rejecting a settlement offer. The plaintiff has already lost the difference between the value of the offer and his less valuable recovery at trial. The danger of such a result already provides an incentive for plaintiffs to settle. It is important to note, however, that the danger of a lesser recovery on the merits is directly tied to the merits of a plaintiff's claim. Thus, forcing the plaintiff to bear this risk serves the Constitutional and Congressional purposes embodied in antidiscriminatin laws.

By contrast, forcing a prevailing plaintiff to bear his own post-offer attorney's fees in the mechanical fashion Petitioners propose imposes a penalty on plaintiffs which may be totally unrelated to

the merits of their cases. Many civil rights plaintiffs are persons of extremely modest means who could not possibly afford the costs of litigating their claims. In normal contingent-fee litigation, where solely monetary damages are concerned, a plaintiff's impecuniousness does not pose an insuperable barrier; a plaintiff can execute an agreement dividing his recovery between himself and his lawyer. The lawyer who has been approached to represent the plaintiff decides to take the case and what percentage of the recovery to demand by assessing the probabilities of various outcomes.

In contrast to the present case, in many civil rights cases monetary damages are either insignificant or unavailable. See Hensley v. Eckerhart, 76 L.Ed.2d 58 at n.5 (Brennan, Marshall, Blackmun, & Stevens, JJ., concurring in part and dissenting in

part); Carey v. Piphus, 435 U.S. at 266; Newman v. Piggie Park Enterprises, 390 U.S. at 402. In such cases, a contingency fee could never prove adequate to induce lawyers to undertake representation of plaintiffs, since the benefit of any injunction or declaration of constitutional principle are not monetary, and therefore cannot be apportioned between the attorney and his client. The legislative history of § 1988 clearly states that the nonpecuniary nature of rights involved should not affect a plaintiff's ability to recover attorney's fees, S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), and, by implication, a plaintiff's ability to pursue his case. Petitioner's construction of § 1988 would impair a civil rights plaintiff's effective vindication of his rights precisely because those rights are nonpecuniary. Such a plaintiff simply

cannot obtain representation by splitting his recovery with his attorney: his recovery is nondivisible and nontransferable.

Moreover, in order to compensate for the possibility that, although they prevail, their clients will not recover any monetary damages, attorneys are likely to demand a higher proportion of a plaintiff's potential recovery as their contingent fee. Even in cases where plaintiffs fully recover, they will retain less of their award. Petitioners' construction thus will both adversely affect prevailing plaintiffs who do not fall within Rule 68's orbit and reallocate the potential gains of a case away from plaintiffs and toward attorneys. Both these results "substantially add to the risks" inhering in civil rights cases and thus "undercut the efforts of Congress' to

provide plaintiffs with a means of fully realizing their constitutional rights. Christiansburg Garment Co., 434 U.S. at 422.

2. **Petitioners' Reading of Rule 68 Conflicts with the Central Role of "Private Attorneys General" in the Enforcement of the Civil Rights Laws.**

Deterring an individual plaintiff from pursuing his case not only prevents him from vindicating his own rights; it also prevents him from vindicating wider interests in nondiscrimination, both those of third parties who will be benefited by whatever declaratory or injunctive relief is obtained and those of the nation at large in the vigorous enforcement of the civil rights laws (see Newman v.Piggie Enterprises, Inc. supra). Petitioners' construction of Rule 68 gives rise to two dangers: first, it forces individual plaintiffs to bear the total risk

of continuing to litigate after a Rule 68 offer even though they will not retain the full benefit of such a decision; second, it creates an incentive for plaintiffs to accept settlements which benefit them but compromise the wider interests involved.

Justice Brennan's opinion in Hensley pointed out that "[c]ivil rights remedies often benefit a large number of persons, many of them not involved in the litigation, making it difficult both to evaluate what a particular lawsuit is really worth to those who stand to gain from it and to spread the costs of obtaining relief among them." 76 L.Ed.2d at 58 n.5. In the context of petitioners' argument on Rule 68, this means that it will often be difficult to put an actual value on either the defendant's offer or the plaintiff's ultimate recovery -- both essential measures for employing the Rule --

and that an individual plaintiff will be unable to recoup the attorney's fees petitioners' position would force him to bear, although other parties will benefit from whatever systemic relief is obtained and would have benefited from whatever systemic relief is obtained and would have benefited even more from the plaintiff's gamble had it paid off. "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich [or fail to charge] the others unjustly at the plaintiff's expense." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970).

Under petitioners' construction of the Rule, a plaintiff presented with an offer is faced with not only the risk of continuing to litigate, but also the risk of how a judge will evaluate his assessment of those

risks of litigation. This enhanced risk to plaintiffs presents them with an incentive to accept a defendant's offer which provides them with some personal relief even though it completely ignores the interests of the public. Because the plaintiff cannot recover his post-offer fees, either from the third parties who would have shared his gain or from the losing defendant, he will be especially reluctant to incur these expenses.

Petitioners' interpretation thus enhances a defendant's opportunity to "buy off" a private attorney general and frustrates the wider purposes of antidiscrimination law. A defendant's offer to a plaintiff of $10,000 may leave the plaintiff better off, but if it leads the plaintiff not to litigate a case which would have awarded the plaintiff $5,000 and an injunc-

tion against unconstitutional discrimination, it may be an inferior outcome both for the plaintiff and for the public. Moreover, because Rule 68 contemplates no judicial involvement in the settlement process, "except in a proceeding to determine costs," there is no opportunity for an independent judge to safeguard the public interests that prompted fee-shifting legislation in the first place. See Fiss, Against Settlement, 93 Yale L.J. 1073 (1984).[1]

3. Petitioners' Interpretation of Rule 68 Is Inconsistent with the Rules Enabling Act.

The Rules Enabling Act, 28 U.S.C. § 2072 (1982), provides that rules of procedure "shall not abridge, enlarge or

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[1] Petitioners' interpretation of Rule 68 would create even greater dangers in class actions brought under Fed. R. Civ. P. 23 See infra Section III.

modify any substantive right...." While "the line between 'substance' and 'procedure' shifts as the legal context changes," Hanna v. Plumer, 380 U.S. 460, 471 (1965), Petitioners' construction of Rule 68 poses a substantial danger of abridging plaintiffs' substantive constitutional and statutory rights.

Attorney's fees are a component of complete relief to which prevailing plaintiffs are entitled. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67-68 (1980). By changing the standard under which such fees are awarded, petitioners' interpretation would both "abridge" and "modify" plaintiffs' rights, as the lower court noted in this case. Chesny v. Marek, 720 F.2d at 479-80.

Indeed, the way in which even courts which have adopted petitioners' approach limit the Rule in order to exclude a defendant's attorney's fees from "costs" implicitly concedes the substantive nature of an attorney's fees award. In Chesny itself, the District Court held that "a 'no' answer is readily reached" to the question whether a defendant's fees fall within the Rule. Chesny v. Marek, 547 F. Supp. 542, 547 (N.D. Ill. 1982). The court explained its decision by claiming that defendants who have lost are not prevailing parties under § 1988. Id. This reading is disingenuous. It is only by viewing the defendant as having "prevailed" in the post-offer stage of the litigation, and the plaintiff as having "lost," that the defendant is entitled to place on plaintiff a burden --the payment of a prevailing plaintiff's fees --he would

otherwise have to bear. However, there is no principled distinction between the "substantive" shifting of defendants' fees and the allegedly "procedural" device petitioners support.

This Court should interpret Rule 68 to avoid the substantive impairment Petitioners' construction would engender. Excluding fees from "costs" covered by Rule 68 would best serve the clearly enunciated congressional goals of antidiscrimination law.

III. PETITIONERS' INTERPRETATION OF RULE 68 CONFLICTS WITH THE POLICIES CONCERNING CLASS ACTIONS EMBODIED IN RULE 23.

This Court has repeatedly recognized that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs." E.g., General Telephone Co. v.

Falcon, 457 U.S. 145, 157 (1982); East Texas Motor Freight System v. Rodriguez, 431 U.S. 395, 405 (1977). The class action lawsuit is a logical extension of the concept of private attorneys general in civil rights cases. Class actions often afford plaintiffs who would not otherwise be able to obtain representation a chance to have their claims presented. Petitioners' interpretation of Rule 68, however, conflicts with both the broad purposes of class action civil rights litigation and the narrow procedural requirements of Rule 23. In particular, petitioners' interpretation will undermine Rule 23(a) (4)'s requirement that "the representative parties ... fairly and adequately protect the interests of the class" and creates problems with Rule

23(e)'s provision that "a class action shall not be dismissed or compromised without the approval of the court...."

A. Petitioners' Construction of Rule 68 Will Create Conflicts of Interests Between Representatives and Class Members.

As currently written, Rule 68 makes no distinction between individual and class actions. In proposing that the Rule be amended to include attorney's fees the Advisory Committee specifically exempted Rule 23 and 23.1 actions from its orbit. The Committee explained its recommendation by pointing out that "[an] offeree's rejection would burden a named representative-offeree with the risk of exposure to heavy liability for costs and expenses that could not be recouped from unnamed class members.... [This] could lead to a conflict of interest between the named representative and other

members of the class." Proposed Rule 68, 98 F.R.D. at 367. The only court to discuss the interaction between Rule 23 and Rule 68 explained its decision not to apply Rule 68 in similar terms. Rule 68 is intended to be coercive, that is, to push plaintiffs to accept settlement offers but "the same coersiveness that, when directed against a party suing in his own behalf, serves the purpose of judicial economy by raising the ante has an added effect in a class action: it introduces a potential conflict between the named party's self-interest and his fiduciary duty to the class." Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500, 502 (N.D. Cal. 1980). The named plaintiff can avoid any exposure for the class' attorney's fees by accepting a settlement; he faces overwhelming obligations if he refuses the offer and the class

recovers less at trial, obligations which he cannot force the class members to share. The named plaintiff thus faces a powerful incentive to negotiate for and accept a settlement which affords _him_ the maximum individual relief possible, regardless of whether the settlement sacrifices the class' interests. A named plaintiff who pursues his interests in this fashion cannot meet the adequate representation requirement of Rule 23(a) (4). _See_ _Hooks v. General Finance Corp._, 652 F.2d 651, 652 (6th Cir. 1981) (per curiam).

In most cases in which a particular proposed representative is rejected because of a potential or actual conflict with the unnamed class members, another member of the class _can_ adequately represent the common interests involved. Petitioners' interpretation in this case is particularly

pernicious because _every_ potential representative faces this conflict of interest. The Court should therefore reject a construction of Rule 68 which needlessly exacerbates the tensions between class representatives and their members.

B. The Application of Rule 68, as Interpreted by Petitioners, to Class Actions Would Be Inconsistent with the Requirements of Rule 23(e).

Rule 23(e), which requires the court's approval before a class action is compromised, is designed "to protect non-party members of a class ... from unjust or unfair settlements affecting their rights by representatives who lose interest or are able to secure satisfaction of their individual claims by compromise." _Moreland v. Rucker Pharmacal Co._, 63 F.R.D. 611, 615 (W.D. La. 1974); _see_ _Nesenoff v. Muten_, 67

F.R.D. 500, 502 (E.D.N.Y. 1974). In short, Rule 23(e) is designed to guard against the dangers to which Petitioner's interpretation of Rule 68 would give rise.

The specific requirements of Rule 68, however, cannot be smoothly integrated into the framework of judicial oversight established by Rule 23. First, Rule 68 explicitly contemplates no judicial involvement in the settlement acceptance process. See Scheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978). If a plaintiff accepts the defendant's offer, then either party may file the offer "and thereupon the clerk shall enter judgment." Fed. R. Civ. P. 68 (emphasis added). Thus, there is no mechanism under Rule 68 for safeguarding the rights of class members. Rule 68 would therefore have to be abrogated in some respects in order to satisfy Rule 23(e).

Essentially, Rule 23(e) requires a judicial hearing to consider the reasonableness of an offer and a plaintiff's acceptance. But Rule 68 does not require any showing of reasonableness by a party. See Delta Air Lines v. August, 450 U.S. at 349-50. If reasonableness is a criterion, however, it should be as relevant to the refusal of an offer as it is to its acceptance. Importing a reasonableness standard into Rule 68 determinations would render the rule superfluous. See supra Section II.A.

Second, Rule 68 sets an explicit ten-day limit on how long an offer may remain open. See Staffend v. Lake Central Airlines, 47 F.R.D. 218 (N.D. Ohio 1969). There is no way that a plaintiff can conscientiously determine whether or not to accept a settlement offer in a case involving complex claims of relief and many

claimants in so limited a period of time. Nor is ten days sufficient time in which to give notice to class members of a pending settlement or for them to respond. Again, some allowance for Rule 23's concerns must be made.

Finally, if a named plaintiff is willing to settle a case, whatever the terms, it cannot be the law that if a judge rejects the settlement pursuant to his power under Rule 23(e), the named plaintiff is still responsible for fees incurred after the offer. To interpret Rule 68 as still requiring the plaintiff to bear the costs does nothing to further the Rule's goal of encouraging settlement, since the plaintiff cannot settle the case without other parties' consent. Such an interpretation would deter class action litigation and

would result in multiple lawsuits, increasing the costs to plaintiffs, defendants, and the courts alike.

Making exceptions to Rule 68 for class actions would, however, encourage some plaintiffs unnecessarily to couch their cases as class actions. This too would result in added litigation costs since the procedural requirements for certification, to name one example, add time and expense. Thus, Rule 68 should be interpreted to avoid these dangers.

IV. PETITIONERS' CONSTRUCTION OF RULE 68 WOULD SIGNIFICANTLY IMPAIR THE ATTORNEY-CLIENT RELATIONSHIP.

Petitioners' interpretation of Rule 68 creates a dangerous potential for apparent conflicts of interest. If the Rule's definition of "costs" includes attorney's fees, then a valid settlement offer must

include some provision for such expenses. See Delta Air Lines v. August, 450 U.S. at 365 (Powell, J., concurring); Scheriff v. Beck, 452 F. Supp. at 1260. An attorney whose client is given an offer of judgment under the Rule therefore is faced with a choice: if his client accepts the defendant's offer, then he will be guaranteed a reasonable attorney's fee, but if his client rejects the offer, he may be unable to recover any of his post-offer fees, regardless of the reasonableness of the client's decision to turn down the offer or how successful he is at trial.

This poses two dangers. First, when a lawyer counsels his client to accept an offer, it may appear that his advice stems more from a desire to ensure that his fee will be paid than from a belief that the settlement is in his client's best

interests. This appearance of impropriety, and a plaintiff's awareness of the potential compromise of his interests, may well impede the settlement process, since clients may refuse even reasonable offers because they mistrust their attorneys' advice.

Second, it encourages a plaintiff's lawyer to treat his compensation as one of the initial subjects of negotiation. Although attorney's fees are formally awarded to the prevailing party, they are in reality granted to the counsel. Accordingly, it has been ruled "improper for a lawyer in a civil rights suit to inject the question of attorney's fees into the balance of settlement discussions." Regalado v. Johnson, 79 F.R.D. 447, 451 (N.D. Ill. 1978).

In run-of-the-mill, individual contingent-fee litigation, these dangers do not loom so large. A plaintiff can tie his lawyer's recovery directly to his own success and thus avoid a shift of resources within the recovery pool. Cf. Chesny v. Marek, 720 F.2d at 477-78.

In both nonpecuniary damages cases and class actions, however, there is no simple way to guard against a lawyer's serving his self-interest first. Cf. Prandini v. National Tea Co., 557 F.2d 1015, 1020 (3d Cir. 1977). In cases involving non-monetary claims, the client cannot tie his attorney's payment to the amount of his recovery. It will often be unclear to him whether his attorney has traded off some of his injunctive or declaratory relief in return

for a higher fee. See Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980).

This problem is exacerbated in class actions. A defendant who is interested in settling the total claim against him will be indifferent to the allocation of the total pool between the class and its attorney. Prandini, 557 F.2d at 1020. There is a tremendous danger that both sides will agree to a "sweetheart" arrangement under the defendant will pay the named plaintiff and his lawyer enough to satisfy them, and they will sell out the interests of the rest of the class. Id. at 1021.

Both the Third and the Ninth Circuits have held that it is a plaintiff's attorney's ethical duty to resolve the plaintiff's substantive claims before negotiating his fees. See Mendoza, 623 F.2d

at 1353; Prandini, 557 F.2d at 1021; Cf. Manual for Complex Litigation, part I, § 1.46, at 75 (1982). An interpretation of Rule 68 which compels defendants to include counsel fees in the negotiations in order to benefit from the Rule's coercive power and which does nothing to protect plaintiffs from sweetheart deals should be rejected.

As the Court of Appeals recognized below, the potential for conflicts of interest exists whenever a lawyer's fee is contingent. Chesny v. Marek, 720 F.2d at 447. There is no justification, however, for exacerbating that tension in order to induce plaintiffs to settle. The justness of a settlement is as important as the speed with which it is achieved.

CONCLUSION

The decision of the Seventh Circuit

should be affirmed.

Respectfully submitted,

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